prejudice." United States v. Torres-Sanchez, 68 F.3d 227, 230 (8th Cir. 1995) (emphasis added).

Southwestern Bell responds that this Court has required the Torres-Sanchez prejudice showing only as a "special, stringent requirement[]" applicable to "deportation proceeding[s]." SWB Br. 30 n.3. That assessment is only half right. It is true that collateral attacks on deportation proceedings are limited by special requirements, but the prejudice requirement for due process claims is not one of them -- which is why Torres-Sanchez described the prejudice requirement as a rule of general application, not a special rule for deportation proceedings. See 68 F.3d at 230.[2]

Moreover, this Court has required due process claimants to demonstrate prejudice even *outside* the deportation context. See Citizens State Bank v. FDIC, 751 F.2d 209, 213-14 (8th Cir. 1984) (right to notice of and opportunity to defend charges against it); United States v. Hood, 593 F.2d 293, 296 (8th Cir. 1979) (preindictment delay claim).[3]

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[2] The only "special" due process rule in Torres-Sanchez was the requirement that the procedural errors be shown to be "so fundamental that they * * * could functionally deprive an alien of judicial review." 68 F.3d at 230 n.3.

[3] A prejudice requirement is *not* tantamount to a requirement that Southwestern Bell prove "'the merits of [its] substantive assertions,'" as Southwestern Bell incorrectly suggests. SWB Br. 41 (quoting Carey v. Piphus, 435 U.S. 247, 266 (1978)). A particularized showing that a due

While ignoring Hood, Southwestern Bell claims that Citizens State Bank did not require a showing of prejudice but instead "simply found that the claimant had received the requisite notice and opportunity to respond." SWB Br. 30-31 n.3. This is not true. The Court specifically cited the Bank's failure to prove prejudice by "suggest[ing] what additional exculpatory evidence it could have introduced" or "list[ing] additional defenses which it might have asserted" had it been granted further process. 751 F.2d at 213.

The Supreme Court's decision in Estes v. Texas, 381 U.S. 532 (1965), is also fatal to Southwestern Bell's claim that prejudice need not be shown to have resulted from an alleged due process violation. Far from treating a prejudice requirement as an exception to the general rule, Estes held that "in most cases involving claims of due process violations we require a showing of identifiable prejudice." Id. at 542. Thus, Southwestern Bell has matters precisely backwards -- lack of identifiable prejudice defeats a due process claim in all but the handful of cases where the "procedure employed by the State involves such a probability

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process violation *could* have altered the outcome is quite different from a showing that it *did* alter the outcome. Only the latter would be inconsistent with Carey.

that prejudice will result that it is deemed inherently lacking in due process." Id. at 542-43.[4]

Southwestern Bell argues that televising a trial, the procedure at issue in Estes, "does not inherently prejudice a proceeding's truth-seeking function." SWB Br. 29. Estes plainly took the opposite view of televised trials, which the Court placed among the few cases "in which a showing of actual prejudice is *not* a prerequisite to reversal." 381 U.S. at 542 (emphasis added). The Court did so because, like the "mayors courts" deemed violative of due process in Tumey v. Ohio, 273 U.S. 510 (1929), televising trials would "inject[] * * * an irrelevant factor into court proceedings" and thereby undermine "the chief function of our judicial machinery [which] is to ascertain the truth." Estes, 381 U.S. at 544. It was only because "television coverage will inevitably result in prejudice" (id. at 550) that Estes did not require a specific allegation of prejudice as part of the defendant's due process claim.

The Supreme Court has not granted the same preferential status to the procedural rights Southwestern Bell asserts here. To the contrary, in Codd v. Velger, 429 U.S. 624 (1977), a discharged police officer asserted a procedural

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[4] An example of the rare case in which prejudice is presumed is where the presiding judge has a financial stake in the outcome. See Tumey v. Ohio, 273 U.S. 510 (1929) (striking down "mayors courts" where the judge was paid by the conviction).

due process claim arising out of his termination without an evidentiary hearing. Id. at 625. Notwithstanding the importance in the abstract of a hearing in a discharge case, the Supreme Court rejected the plaintiff's due process claim because he had "made out no claim under the Fourteenth Amendment that he was harmed by the denial of a hearing" (id. at 628) -- that is to say, like Southwestern Bell here, he had failed to show prejudice flowing from the alleged procedural deprivation.[5] Under Codd and Estes, then -- not to mention Torres-Sanchez and other decisions from this Court -- the district court was plainly correct that Southwestern Bell cannot prevail on its due process claims absent a showing of prejudice.[6]

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[5] Codd refutes Southwestern Bell's erroneous assertion that the due process violations it claims occurred "directly frustrate the truth-seeking function" and thus prejudice can be presumed. SWB Br. 31. Except where, as here, an administrative agency exercises its discretion to resolve a matter on the basis of a "paper hearing," an evidentiary hearing obviously is the principal means by which a party learns of and confronts the opposing party's evidence. Nevertheless, Codd ruled that a claim to a due process hearing necessarily fails unless the challenger carries its burden of proving that it was "harmed" by the lack of hearing. 429 U.S. at 628.

[6] Southwestern Bell urges this Court to disregard its decisions in Torres-Sanchez and Citizens State Bank in favor of Nevels v. Hanlon, 656 F.2d 372 (8th Cir. 1981). Nevels, however, expressly acknowledged that it conflicted with Codd. See id. at 376 (giving "but see" citation to Codd). Subsequent decisions, including Torres-Sanchez, have brought the law of the Circuit back into line with Codd. This explains why even now, twenty years after Nevels was issued, the prejudice aspect of Nevels stands as an outlier, not followed in any subsequent decision from this Court.

2. Southwestern Bell does not seriously contest the district court's finding (JA 1725) that it failed to allege any prejudice flowing from the due process violations it asserts, nor could it. After all, as the district court noted, Southwestern Bell's attorney *admitted* in open court that Southwestern Bell had no specific allegation of prejudice:

> THE COURT: You are presuming prejudice based on the fact you didn't have the procedures you think due process required?
>
> MR. LANE: *Yes*, and I think the law is pretty clear that * * * *you simply need to show the process wasn't followed.* And that in our view is sufficient here.

JA 1650-51 (emphasis added).[7]

Even apart from Southwestern Bell's judicial admission, Southwestern Bell's belated suggestions of prejudice are nothing more than an exercise in boot-strapping. For example, Southwestern Bell concededly availed itself of the opportunity to challenge the PSC's decision on rehearing, based on the almost

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[7] Southwestern Bell's effort to back-pedal from its prior concession (see SWB Br. 32), should be rejected. Although Southwestern Bell's attorney below made the naked assertion that certain unidentified adjustments to Southwestern Bell's cost model were "wrong" (JA 1650), Southwestern Bell has failed to identify any *evidence* that might have been submitted in support of that claim. Southwestern Bell's other citation (JA 1620) is to its argument that the PSC set NRC rates based on undisclosed argument by AT&T. But as explained infra, the PSC *rejected* AT&T's position on NRCs, and reduced Southwestern Bell's proposed NRCs based solely on its review of the evidence Southwestern Bell submitted.

200-page report dutifully prepared by Staff (which carefully documented the factual bases for its recommendation and the PSC's eventual rulings). Southwestern Bell nonetheless asserts (SWB Br. 31-37) that it was prejudiced by the PSC's procedure because it was entitled to comment on the Staff Report before the PSC announced its decision and because it was entitled to the benefit of a formal administrative record. These, of course, are precisely the merits of the due process issue -- namely, whether, in fact, Southwestern Bell has a constitutional right to the additional procedures it seeks -- and merely rehashing Southwestern Bell's alleged due process rights cannot in itself demonstrate the required prejudice flowing from the alleged violation.[8]

Southwestern Bell cannot identify any additional evidence that it would have submitted because there is none. Southwestern Bell's general challenge to the PSC's use of a forward-looking pricing methodology is a pure legal issue. As to Southwestern Bell's challenge to the PSC's 50% reduction of its NRC proposals, Southwestern Bell's only claim is that the adjustment was arbitrary and unexplained. Indeed, when Southwestern Bell had the opportunity on rehearing to respond to Staff's concerns and offer additional evidence to support its cost proposals, Southwestern Bell responded that it had no intention of incurring the

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[8] Southwestern Bell resorts to similar bootstrapping on its other claims. See, e.g., SWB Br. 33, 35 (cross-examination).

expense necessary to develop supporting evidence. JA 807 ("The expense of performing time and motion studies for items with limited application . . . would be an imprudent expense which Southwestern Bell should not be forced to incur."). With respect to the PSC's finding that Southwestern Bell voluntarily agreed to combine network elements for AT&T, Southwestern Bell presses here only the argument it made to the PSC – that it was "compelled" to enter that agreement by the FCC's rules.

Southwestern Bell protests that it would be "absurd" to require a showing of prejudice caused by *ex parte* communications (SWB Br. 31), but that is not true. In fact, more recent D.C. Circuit decisions make clear that "illegal *ex parte* contacts with an agency only make agency action voidable, so prejudice must be shown." FEC v. Legi-Tech, Inc., 75 F.3d 704, 75 F.3d 704, n.4 (D.C. Cir. 1996) (citing Professional Air Traffic Controllers Org. v. FLRA, 685 F.2d 547, 564-65 (D.C. Cir. 1982)); see also, e.g., Freeman Eng'g Assocs., Inc. v. FCC, 103 F.3d 169, 184 (D.C. Cir. 1997) (sustaining FCC decision despite unlawful *ex parte* contacts because those contacts had no impact on the decision).[9]

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[9] Southwestern Bell also ignores the font for the prohibition of *ex parte* contacts with federal agencies. Those contacts have been held to contravene "the requirements of judicial review under the Administrative Procedure Act." United States Lines, Inc. v. Federal Maritime Comm'n, 584 F.2d 519, 539 (D.C. Cir. 1978); see also id. at 534 n.43 (describing APA's "requirement that review take place on 'the whole record'"). The

Even if unable to show the precise impact of *ex parte* contacts, Southwestern Bell could, for instance, show that the PSC actually relied upon, or justified its decision with reference to, *ex parte* information, or that the PSC's decision is not supported by the public record alone. E.g., United States Lines, Inc. v. Federal Maritime Comm'n, 584 F.2d 519, 523 (D.C. Cir. 1978) (agency "improperly relied on unspecified materials known only to it and on *ex parte* contacts nowhere mentioned or recorded in the public record"). Southwestern Bell cannot make even this limited showing because, as the district court noted (JA 1726), the Staff Report appended to the PSC's order "detail[ed] all the facts upon which [the PSC] relied" and there is no basis for any assumption "that the [PSC] relied on information that was not placed in the record in the [Staff] Report." JA 1726 n.10.

An examination of the 6 examples of *ex parte* contacts Southwestern Bell actually cites (SWB Br. 37-38) reveals that, in each instance, those contacts had

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Telecommunications Act contains no analogous statutory requirements. Southwestern Bell seeks refuge in the principle that courts are limited to the arbitration record in deciding section 252(e)(6) appeals (SWB Br. 39), but that principle merely precludes district courts from engaging in fact-finding in such cases. It does *not* create an affirmative obligation on the part of the state commission (as the APA does as to federal agencies) to compile an administrative record comprising all materials and information brought before the state commission, and Southwestern Bell cites no cases for its contrary view.

no effect on the outcome. *First*, Southwestern Bell cites the Staff Report's statement that "[b]ased on information discovered while attempting to determine SCIS/MO discounts, Staff has reason to suspect that SWBT may be receiving additional discounts." JA 595. But Southwestern Bell omits the very next sentence, which states that "Staff is not recommending any modifications with regard to [Southwestern Bell's] proposed switch discounts." Id. *Second*, Southwestern Bell points to Staff's statement that it "has reviewed data which shows LIDB, 800 and Calling Name queries are increasing." JA 594. However, the Report notes that "[i]t is undisputed that [the relevant] links will experience increased utilization," and that Staff based its actual forecast of future utilization on "discussions with SWBT's signaling subject matter expert," id., *not* on any undisclosed information concerning utilization increases.

Third, Southwestern Bell quotes a statement from the Staff Report that "AT&T has provided data directly to Staff [concerning its] composite depreciation rates." JA 645. But Staff was attempting to determine AT&T's composite depreciation rate, along with the rates of 18 other "benchmark" companies, solely as a "reality check" to assess the general "reasonableness" of its proposed modifications to Southwestern Bell's depreciation inputs. JA 644-46. This benchmarking did not itself result in any modification to Southwestern Bell's rates, but merely led Staff to conclude that Southwestern Bell's

"[depreciation] inputs are reasonable if modified as recommended." JA 648. *Fourth*, Southwestern Bell cites a statement that AT&T "provided Staff several documents with claims to support its depreciation inputs." JA 648-49. However the 6 specific modifications Staff recommended to Southwestern Bell's proposed depreciation inputs are each individually justified without reference to AT&T's submission. JA 649-50.

Fifth, Southwestern Bell quotes the Report's statement that AT&T argued that Southwestern Bell should not be permitted to recover *any* NRCs. JA 665. However, as discussed infra, Staff rejected AT&T's position, and instead recommended reductions to Southwestern Bell's NRCs based on flaws in the data Southwestern Bell itself submitted. Id.

Finally, Southwestern Bell cites the statement that Staff provided the PSC with a detailed analysis of the discounts received from equipment vendors by Southwestern Bell, AT&T, and MCI. JA 574. However, the Report makes clear that Staff *only* recommended modifications to Southwestern Bell's discount rates based on Staff's review of the discounts Southwestern Bell was actually receiving, *not* based on AT&T's or MCI's arrangements with vendors. Id.

Absent any showing of prejudice as to any of its due process arguments, Southwestern Bell cannot prevail, and the decision of the district court on this issue should be affirmed.

B. Due Process Does not Require State Commissions To Afford the Trial-Type Procedure Southwestern Bell Seeks.

Even if the Court elects to reach the merits of the constitutional issues raised in this appeal, Southwestern Bell still cannot prevail. *First*, it is settled law that the due process standards that apply in "judicial" or "quasi-judicial" proceedings do not apply to the prospective ratemaking at issue here. *Second*, the sweeping constitutional rules Southwestern Bell urges the Court to adopt here would be unwarranted even if it were appropriate to apply the due process standards applicable in judicial proceedings. That is particularly so given that the rigid procedural framework Southwestern Bell seeks would interfere with the rapid transition to competition desired by Congress.

1. Southwestern Bell's due process argument relies almost exclusively on precedents involving "judicial" or "quasi-judicial" agency action. That reliance is totally misplaced because the only issues raised by Southwestern Bell that is not a pure legal issue involve prospective ratemaking.

As the Supreme Court has held for almost a century: "[T]he function of ratemaking is purely legislative in its character, and this is true, whether it is exercised directly by the legislature itself or by some subordinate or administrative body, to whom the power of fixing rates in detail has been delegated." Mayor and Aldermen of the City of Knoxville v. Knoxville Water

Co., 212 U.S. 1, 8 (1909); see also, e.g., New Orleans Public Service, Inc. v. City of New Orleans, 491 U.S. 350, 370-71 (1989) ("NOPSI") ("The establishment of a rate is the making of a rule for the future, and therefore is an act legislative not judicial in kind."). It is well settled that there is no constitutional right to trial-type process in such ratemaking proceedings.[10]

The Supreme Court's decision in United States v. Florida East Coast Railway, 410 U.S. 224 (1973), a case involving agency determinations of rates one railroad carrier could charge another for use of its boxcars, confirms that Southwestern Bell had no right to trial-type process here. In that case, the Supreme Court firmly rejected a claim that trial-type procedural rights apply to prospective ratemaking.

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[10] See, e.g., Bi-Metallic Investment Co. v. State Board of Equalization, 239 U.S. 441 (1915); see generally Pickus v. United States Bd. of Parole, 543 F.2d 240, 244 (D.C. Cir. 1976) ("'When not bounded by statutory procedural requirements, the Supreme Court has consistently been willing to assume that due process does not require any hearing or participation in "legislative" decisionmaking other than that afforded by judicial review after rule promulgation.'"). This holds true even though the PSC prescribed rates for only one entity. See New Orleans Public Service, Inc. v. City of New Orleans, 491 U.S. 350, 370-71 (1989) (ratemaking "legislative" although for a single electric utility); Mayor and Aldermen of the City of Knoxville v. Knoxville Water Co., 212 U.S. 1, 8 (1909) (same as to a single water company); Murphy Oil Corp. v. FPC, 431 F.2d 805, 810 (8th Cir. 1970) (same as to a single natural gas producer).

Specifically, the Court rejected a railroad's challenge to the ICC procedures that allowed only written submissions:

> We know of no reason to think that an administrative agency in reaching a decision cannot accord consideration to factors such as those set forth in the [statute] by means other than a trial-type hearing or the presentation of oral argument by the affected parties. Congress by that amendment specified necessary components of the ultimate decision, but it did not specify the method by which the Commission should acquire information about those components.

Id. at 235. The Court further ruled that even a statutory requirement of a "hearing" "does not necessarily embrace either the right to present evidence orally and to cross-examine opposing witnesses, or the right to present oral argument to the agency's decisionmaker." Id. at 240.

Although the rates imposed were based on factual analysis, "[t]he factual inferences were used in the formulation of a basically legislative-type judgment, for prospective application only," rather than adjudicating the legality of the rates that the railroad had charged other carriers in the past. Id. at 246. The rates, therefore, were legislative, not adjudicative, in nature, and there could be no requirement for a trial-type hearing where not specifically required by Congress.[11]

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[11] The two rate cases that Southwestern Bell cites were both *backward-looking* in nature. See Ohio Bell Tel. Co. v. Public Utils. Comm'n, 301 U.S. 292, 298 (1937) (adjudication of refund liability for charging excessive rates, in proceeding coupled with ratemaking); Morgan v. United States,

In the end, only one of Southwestern Bell's cases, Home Box Office, Inc. v. FCC, 567 F.2d 9 (D.C. Cir. 1977) ("HBO"), purported to apply procedural due process principles to a legislative act (there, an informal rulemaking subject to the APA). The fleeting references in HBO to due process (e.g., "fundamental notions of fairness implicit in due process," id. at 56) were mere dictum, however, in light of the court's holding that undisclosed *ex parte* contacts violate the APA. See id. at 54 (APA's judicial review provisions require that "the public record must reflect what representations were made to the agency so that relevant information supporting or refuting those representations may be brought to the attention of the reviewing courts").[12] The D.C. Circuit has since rejected the due

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304 U.S. 1, 14-15 (1938) ("quasijudicial" proceeding to determine reasonableness of rates charged by stockyard agencies and to set maximum rates); ICC v. Louisville & Nashville R.R. Co., 227 U.S. 88, 92 (1913). These cases are distinguishable here because, as the Supreme Court held in Florida East Coast, they do not apply to "proceedings for the purpose of promulgating policy-type rules or standards." 410 U.S. at 245. Almost all of the other cases Southwestern Bell cites plainly involved adjudications, not forward-looking decisions of a legislative nature. E.g., Nevels v. Hanlon, 656 F.2d 372 (8th Cir. 1981) (termination of public employee); United States Lines, Inc. v. Federal Maritime Comm'n, 584 F.2d 519, 540 (D.C. Cir. 1978) ("quasi-adjudicatory proceeding" to determine whether antitrust exemption should be granted); Kennedy v. Robb, 547 F.2d 408 (8th Cir. 1976) (termination of public employee). Two other cases Southwestern Bell cites were not due process holdings. See United States v. Abilene & S. Ry., 265 U.S. 274 (1924); Portland Audubon Soc'y v. Endangered Species Comm'n, 984 F.2d 1534 (9th Cir. 1993).

[12] This is likewise true of certain other decisions cited by Southwestern Bell -- they gratuitously refer to due process when the cases were actually

process ruminations of HBO: "As a general rule, due process probably imposes no constraints on informal rulemaking beyond those required by statute. Thus we are very wary of extending the due process reasoning of Home Box Office." United Steelworkers of Am. v. Marshall, 647 F.2d 1189, 1215 n.28 (D.C. Cir. 1979) (citation omitted).[13]

2. Southwestern Bell could not prevail on its constitutional claim even if due process standards from judicial proceedings were applicable here.

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resolved on statutory grounds. See, e.g., Greene v. McElroy, 360 U.S. 474, 508 (1959) ("We decide only that in the absence of explicit authorization from the President or Congress the respondents were not empowered to deprive petitioner of his job in a proceeding in which he was not afforded the safeguards of confrontation and cross-examination."); Morgan v. United States, 304 U.S. 1, (1938) (interpreting the Packard and Stockyards Act's requirement of "a 'full hearing'"); United States Lines, 584 F.2d at 543 n.63 (D.C. Cir. 1978) ("Our prohibition of ex parte contacts . . . is based on the statutory requirements of a hearing before the [Federal Maritime Commission] and of judicial review under an arbitrary and capricious standard which Congress has chosen to impose [in the APA]."). As for the pre-New Deal Supreme Court cases that Southwestern Bell cites in support of its due process claims (SWB Br. 33-34), the Supreme Court itself has found them to be "less than clear as to whether they depend upon the Due Process Clause * * *, or upon generalized principles of administrative law formulated prior to the adoption of the Administrative Procedure Act." Florida East Coast, 410 U.S. at 242.

[13] See also, e.g., Freeman Eng'g Assocs., Inc. v. FCC, 103 F.3d 169, 184 (D.C. Cir. 1997) (affirming despite "quite serious" *ex parte* contacts where the agency "reach[ed] the exact opposite conclusion" to that advocated in such contacts); Town of Norwood v. FERC, 53 F.3d 377, 384-85 (D.C. Cir. 1995) (despite *ex parte* communications, "the Commission's decision in this case is fully supported on its own record and is fully amenable to judicial review on that record").

Although Southwestern Bell would like to believe otherwise, the Due Process Clause is not a super-"Administrative Procedure Act."

"[D]ifferences in the origin and function of administrative agencies 'preclude wholesale transplantation of the rules of procedure, trial and review which have evolved from the history and experience of the courts.' The judicial model of an evidentiary hearing is neither a required, nor even the most effective, method of decisionmaking in all circumstances." Mathews v. Eldridge, 424 U.S. 319, 348 (1976) (citation omitted).

In deciding precisely what process is due, the Court is guided by "consideration of three distinct factors": (1) "the private interest that will be affected by the official action;" (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute safeguards;" and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." Id. at 335.

A proper balance of these interests confirms that none of the procedural mechanisms Southwestern Bell seeks -- not an evidentiary hearing, cross-examination, record-creation requirements, or a flat ban on all *ex parte* communications -- was required, on these facts, by the Constitution. Thus, the Court need not endorse the procedures employed by the PSC in this case as a

model for future arbitrations (and AT&T does not do so) in order to realize that Southwestern Bell's claim should be rejected.

First, the private interest at stake here does not demand trial-type procedures. The classic case where the private interest is sufficiently compelling to require judicial forms of procedure involves termination welfare benefits. See Goldberg v. Kelly, 397 U.S. 254 (1970). The reason is obvious -- a termination of welfare benefits "may deprive an eligible recipient of the very means by which to live while he waits [for post-deprivation process]." Id. at 264.

Southwestern Bell's interest in charging higher rates to its potential competitors does not even remotely approach the level necessary to demand "the fullest measures of due process." SWB Br. 28. Obviously, then, "there is [far] less reason here than in Goldberg to depart from the ordinary principle, established by [Supreme Court] decisions, that something less than an evidentiary hearing is sufficient prior to adverse administrative action." Mathews, 424 U.S. at 342.[14]

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[14] There is also far less justification here for predeprivation, trial-type procedures than in this Court's public employee termination cases, cited by Southwestern Bell. See, e.g., Winegar v. Des Moines Indep. Community School Dist., 20 F.3d 895, 901 (8th Cir. 1994) (citing "irreparable consequences" resulting from suspension of high school teacher); Kennedy v. Robb, 547 F.2d 408, 414-15 (8th Cir. 1976) (citing "extreme hardship" and "disastrous" consequences to tenured employee of losing his livelihood); see also Nevels v. Hanlon, 656 F.2d 372, 374 (8th

Southwestern Bell protests that it was denied "even the most basic due process protections applicable to truly minor deprivations of property." SWB Br. 28. That argument, however, is based on a gross overestimate of the amount of process that is normally due. As Mathews indicated, evidentiary hearings are generally *not* required before administrative action can be taken. 424 U.S. at 342; see, e.g., Riggins v. Board of Regents, 790 F.2d 707, 712 (8th Cir. 1986) (holding that "informal meetings with supervisors" can substitute for formal hearings in discharge cases; despite Nevels v. Hanlon, 656 F.2d at 376, "the opportunity to cross-examine or confront witnesses" is not required). As this Court has explained, "many constitutional deprivations of protected interests are predicated on no more than notice and an opportunity for the claimant to tell his side of the story." Goff v. Dailey, 991 F.2d 1437, 1441 (8th Cir. 1993). Southwestern Bell undeniably got that level of process here.

Second, Southwestern Bell has failed to establish a high risk of error inherent in the procedures utilized by the PSC. Courts have recognized that the risk of error (and therefore the need for adversarial proceedings) is greatest when a determination hinges upon contested historical facts (see Louisiana Ass'n of Indep. Producers and Royalty Owners v. FERC, 958 F.2d 1101, 1113 (D.C.

Cir. 1981) (worker fired on serious grounds of malfeasance).

Cir.1992) ("Louisiana Producers")) or other disputed factual issues such as intent (see Reilly v. Pinkus, 338 U.S. 268, 276 (1949)). This arbitration did not involve such matters but rather highly technical matters to be resolved by an experienced ratemaking agency in accordance with federal standards.

In such a proceeding, trial-type procedures need not be followed unless specifically required by statute. Administrative agencies can resolve "complex and technical factual controversies" on the basis of "written submissions, possibly supplemented by oral argument" where desired by an agency. Virgin Islands Hotel Ass'n (U.S.), Inc. v. Virgin Islands Water & Power Auth., 476 F.2d 1263, 1268 (3d Cir. 1973); see also Moreau v. FERC, 982 F.2d 556, 568 (D.C. Cir. 1993) (holding that "even when there are such disputed issues, FERC need not conduct a[n evidentiary] hearing if they may be adequately resolved on the written record").

As the court held in Louisiana Producers: "Trial-type proceedings . . . are necessary only when 'a witness' motive, intent, or credibility needs to be considered' or 'where the issue involves a dispute over a past occurrence.'" 958 F.2d at 1113. By contrast, cross-examination and other features of judicial procedure are not necessary as to "'purely technical issues' capable of being resolved not on the basis of a witness' motive or memory, but rather upon an

'analysis of the conflicting data and a reasoned judgment as to what the data shows.'" Id.[15]

Other than the mantra that the arbitration involved "complex factual and technical disputes" (SWB Br. 45), Southwestern Bell never shows that the PSC's failure to employ full-blown judicial procedures denied it a meaningful opportunity to be heard. The reason for this is clear: Southwestern Bell had ample opportunity to be heard throughout this proceeding. For example, the following points of input were available to Southwestern Bell: (1) the extended set of evidentiary hearings (replete with cross-examination) conducted in the First Arbitration; (2) lengthy and frequent meetings with PSC Staff during the permanent pricing phase of the First Arbitration; (3) pre-filed testimony in the Second Arbitration; (4) mediation sessions with the Special Master in the Second Arbitration; and (5) the rehearing process at the conclusion of both arbitrations

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[15] Although Southwestern Bell asserts that this quotation "is taken entirely from the court's characterization of the respondent's argument," SWB Br. 46, Louisiana Purchasers immediately prefaced this passage by stating "[t]he Commission's response is *simple and compelling*: even with the August hearings, the [petitioner] had all the process it was due." 958 F.2d at 1113 (emphasis added). Based on the Commission's "compelling" response, the D.C. Circuit held that "the [petitioner's] assertion that it was denied a meaningful opportunity to be heard is unfounded." Id. at 1114.

and the generic proceeding.[16] Particularly in light of all these opportunities for Southwestern Bell to make its views known to the PSC, there is no reason, on *this* record, to believe that trial-type safeguards would have added much in the way of increased accuracy.

Third, the final consideration under the Mathews test, involving the costs and burdens to the PSC of requiring trial-type procedures, likewise militates against the greater procedural formality Southwestern Bell seeks. Congress' intent in passing the landmark Telecommunications Act was "to shift monopoly markets to competition as quickly as possible." To effectuate that intent, Congress imposed strict statutory deadlines on state commission proceedings to implement the Act. H.R. Rep. No. 104-204, at 89, reprinted in 1996 U.S.C.C.A.N. at 55; see also Iowa Utils. Bd. v. FCC, 120 F.3d 753, 816 (8th Cir. 1997) ("Iowa I"), aff'd in part and rev'd in part, 119 S. Ct. 721 (1999).

Southwestern Bell simply ignores the particular risk of straitjacketing state

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[16] Southwestern Bell dismisses rehearing as irrelevant "after-the-fact review" (SWB Br. 35), but it is clear that "meaningful postdeprivation procedures" *can* make up for a perceived inadequacy of predeprivation procedures. Winegar v. Des Moines Indep. Community School Dist., 20 F.3d 895, 901 (8th Cir. 1994). Indeed, in Mathews v. Eldridge itself, the Supreme Court cited the claimaint's right to challenge the agency's tentative assessment and thereby "'mold' his argument to the precise issues which the decisionmaker regards as crucial" as militating against the need for a predeprivation hearing. 424 U.S. at 346.